NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BAY INSTITUTE OF SAN FRANCISCO, et al.,

Plaintiffs - Appellants,

and,

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants - Appellees,

v.

PIXLEY IRRIGATION DISTRICT, et al.,

Plaintiff-Intervenors.

No. 02-16041

D.C. Nos. CV-97-06140-OWW
CV-98-05261-OWW

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al.,

Plaintiffs - Appellants,

and,

BAY INSTITUTE OF SAN FRANCISCO, et al.,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants - Appellees,

v.

PIXLEY IRRIGATION DISTRICT, et al.,

Plaintiffs -Intervenors.

No. 02-16045

D.C. No. CV-97-06140-OWW

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted May 12, 2003
San Francisco, California

Before: CANBY, KLEINFELD, and RAWLINSON, Circuit Judges.

This case involves the administration by the Department of the Interior ("Interior") of water in California's Central Valley Project (the "Project"). Appellants San Luis & Delta-Mendota Water Authority, et al., and Bay Institute of San Francisco, et al., appeal from a final partial judgment issued by the district court pursuant to Fed. R. Civ. P. 54(b).

The parties filed cross-motions for summary judgment challenging the accounting methodology used by Interior in implementing Section 3406(b)(2) of the Central Valley Project Improvement Act ("Improvement Act"). The district court severed the accounting issues from the rest of the case and issued a final partial judgment on the accounting issues pursuant to Rule 54(b).

The district court's partial judgment is final for purposes of appeal. *See Franklin v. Fox*, 312 F.3d 423, 429 n.2 (9th Cir. 2002).

1. The district court correctly concluded that Section 3406(b)(2) does not require Interior to calculate the cost of water actions taken pursuant to § 3406(b)(2) against a hypothetical model of Project operations during the 1928-1934 drought period. Section 3406(b)(2) unambiguously requires only calculation of Project yield by determining the delivery capability of the Project during the specified drought period.

2. The district court also correctly concluded that Interior may not exclude from its calculation of Project yield certain water flows implemented in connection with the Auburn Dam. Section 3406(b)(2) requires Interior to exclude from its Project yield calculation only those "flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements . . ." The record reflects no such license, permit or other agreement concerning the Auburn Dam flows.

3. The district court correctly prohibited Interior from using offset/reset matrices in accounting for use of water under § 3406(b)(2), to impermissibly alter the 800,000 acre feet designated by Congress.

4. The district court correctly found that the Improvement Act does not prohibit Interior from reusing water initially released for (b)(2) purposes. Because the Improvement Act does not specifically address reuse, Interior's reasonable interpretation of the statute is entitled to deference. *See Wilderness Society v. United States Fish and Wildlife Serv.*, 316 F.3d 913, 921-22 (9th Cir. 2003).

5. The district court erred in concluding that Interior lacks discretion to

specify what portion of the 800,000 acre feet of Project yield set aside in Section 3406(b)(2) may be used for water quality and Endangered Species Act purposes. Section 3406(b)(2) provides that the "primary purpose" to which the 800,000 acre feet should be dedicated is the implementation of "fish, wildlife, and habitat restoration purposes authorized by this title . . ." Section 3406(b)(2) also provides that the 800,000 acre feet may be used to "help" meet obligations under the Endangered Species Act and to "assist" in meeting water quality standards. The non-mandatory language of the statute gives Interior discretion to allocate the 800,000 acre feet among fish and wildlife, water quality, and endangered species obligations, as long as Interior's allocation gives effect to the hierarchy of purposes established in Section 3406(b)(2). *See Bicycle Trails Council v. Babbitt*, 82 F.3d 1445, 1461-62 (9th Cir. 1996).

AFFIRMED in part and REVERSED in part. Each party is to bear its own costs on appeal.